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18 **UNITED STATES BANKRUPTCY COURT**
 19 **DISTRICT OF NEVADA**

20 In re: USA COMMERCIAL MORTGAGE COMPANY, Debtor.	21 Case No. BK-S-06-10725 LBR Case No. BK-S-06-10726 LBR Case No. BK-S-06-10727 LBR Case No. BK-S-06-10728 LBR Case No. BK-S-06-10729 LBR
22 In re: USA CAPITAL REALTY ADVISORS, LLC, Debtor.	23 Chapter 11 Jointly Administered Under Case No. BK-S-06-10725 LBR
24 In re: USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, Debtor.	25
26 In re: USA CAPITAL FIRST TRUST DEED FUND, LLC, Debtor.	27
28 In re: USA SECURITIES, LLC, Debtor.	29
Affects: <input checked="" type="checkbox"/> All Debtors <input type="checkbox"/> USA Commercial Mortgage Company <input type="checkbox"/> USA Securities, LLC <input type="checkbox"/> USA Capital Realty Advisors, LLC <input type="checkbox"/> USA Capital Diversified Trust Deed Fund, LLC <input type="checkbox"/> USA Capital First Trust Deed Fund, LLC	30

**NOTICE OF FILING OF
 WEDNESDAY, DECEMBER 20, 2006
 HEARING TRANSCRIPT
 (AFFECTS ALL DEBTORS)**

1 USA Commercial Mortgage Company, USA Securities, LLC, USA Capital Realty
2 Advisors, LLC, USA Capital Diversified Trust Deed Fund, LLC and USA Capital First Trust
3 Deed Fund, LLC (collectively, the "Debtors"), by and through their counsel, hereby file the
4 Transcript of Proceedings of the Hearing In The Matter of USA Commercial, Taken on
5 Wednesday, December 20, 2006 at 10:30 a.m., which is attached hereto as **Exhibit "1."**

6 Respectfully submitted this 2nd day of January, 2007.

7 */s/ Lenard E. Schwartzer, Esq.*
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EXHIBIT “1”
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COPY

TRANSCRIPT OF PROCEEDINGS OF THE BANKRUPTCY HEARING IN
THE MATTER OF U.S.A. COMMERCIAL HELD BEFORE
HONORABLE LINDA B. RIEGLE

Taken on Wednesday, December 20th, 2006

At 10:30 a.m.

At The Foley Building
300 South Third Street
Las Vegas, Nevada

REPORTED BY: RENE' R. HANNAH, CCR NO. 326

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★ ★ ★ ★ ★

2 THE COURT: U.S.A. Commercial. Appearances,
3 please?

4 MR. KIRBY: On the telephone is Dean Kirby of
5 Kirby & McQuinn.

6 MS. JARVIS: Annette Jarvis and Steve Strong
7 of Ray, Quinney & Nebeker on behalf of the debtors and
8 debtors in possession.

13 MS. CARLYON: Good morning, Your Honor.
14 Candace Carlyon of Shea & Carlyon on behalf of the
15 First Trust Deed Fund Committee.

16 MS. FREEMAN: Good morning. Susan Freeman
17 and Rob Charles of Lewis and Roca on behalf of the
18 Unsecured Creditors Committee.

19 MS. MCPHERSON: Good morning, Your Honor.

20 Jeanette McPherson of Schwartzer & McPherson law firm
21 on behalf of the debtors and debtors in possession.

22 MR. OLSON: Good morning, Your Honor. Bob
23 Olson of Beckley Singleton, Nevada counsel for the
24 Diversified Trustee Fund Committee.

25 MR. SMITH: Good morning, Your Honor. Alan

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1 Smith for the Lenders Protection Group.

2 MR. HERMAN: Good morning, Your Honor. Jeff
3 Herman of Orrick, Herrington & Sutcliffe for the
4 Diversified Fund Committee.

5 MR. FIELD: Good morning, Your Honor. Eric
6 Field on behalf of the Pension Benefit Guarantee
7 Corporation.

8 MS. ALLF: Good morning, Your Honor. Nancy
9 Allf of, I'm co-counsel with Robert Lepome, a group of
10 direct lenders called the Alexander Group.

11 MR. SCHMAHL: Good morning, Your Honor.
12 Michael Schmahl on behalf of Dr. Gary Kantor, Mrs.
13 Kantor and Kantor Nephrology 401K plan.

14 MR. GORDON: Gerald Gordon and Greg Garman of
15 Gordon & Silver on behalf of the Direct Lenders
16 Committee.

17 MS. CHUBB: Good morning. Janet Chubb of
18 Jones Vargas for the objecting Jones Vargas creditors.

19 MR. DAVIS: Good morning, Your Honor. George
20 Davis of Wild, Gotchala & Manges on behalf of Compass
21 Partners.

22 MR. LANDIS: Good morning, Judge. Augie
23 Landis, assistant United States trustee.

24 THE COURT: As an aside, I signed that order
25 for the trustee in that investment partners case.

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1 MR. LANDIS: I'll make the appointment right
2 after this hearing.

3 THE COURT: Let me go ahead and get the
4 appearances on the telephone.

5 MR. KIRBY: Dean Kirby, Kirby & McQuinn for
6 Debt Acquisition Company of America.

7 MR. COHEN: Good morning, Your Honor. This
8 is David Cohen, Warner, Stevens for Sierra Liquidity
9 Fund.

10 MR. LEVINSON: Good morning. Mark Levinson,
11 of Orrick on behalf the Diversified Committee.

12 THE COURT: Okay. All right. We had some
13 matters that were continued until 1:30, but they're
14 resolved on the PBGC issue and then the question's also
15 on the Bunch vote.

16 MR. SCHWARTZER: Lenard Schwartzer appearing
17 for the debtor and the debtor in possession. Your
18 Honor, with regard to the Bunch vote it has not been
19 resolved and that is set for argument at 1:30. And I
20 filed an opposition this morning and it should have
21 been hand delivered to your chambers this morning with
22 regard to the law with regard to that. I don't see Mr.
23 Holley here, so I assume he's going to appear at 1:30.

24 THE COURT: And of course, that was set
25 before we realized this would be set at 10:30, so

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1 that's understandable.

2 MR. SCHWARTZER: That's right. And I think
3 the outcome of that motion will have something to do
4 with confirmation because if the Bunch claim is not
5 allowed to vote, my understanding is class A-4 would be
6 an accepting class in this case. But of course, I
7 haven't been, wasn't here for the rest of the hearing
8 yesterday, so I don't know if the Court is going to go
9 forward without knowing that issue.

10 THE COURT: Okay.

11 MR. FIELD: Good morning, Your Honor. Eric
12 Field on behalf of the PBGC Fund. I do not believe
13 that our issue has been resolved, either.

14 THE COURT: So where are we on that,
15 what's?

16 MR. FIELD: I think we're --

17 MS. JARVIS: I think Your Honor will stay the
18 ruling on what language is, whether release is
19 effective as we put it in a reply brief and try to
20 accommodate whether the Court's going to require us to
21 go further.

22 THE COURT: Okay. So tell me again, so,
23 because there was argument back and forth. The PBGC
24 contends that the release cannot release out Mr.,
25 cannot release out Mesirrow? Tell me your position

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1 again.

2 MR. FIELD: Our position is that the release
3 cannot release any fiduciaries of the pension plan, be
4 it Mesirow or any other possible fiduciary. And that
5 any such release would be in violation of URISA, would
6 make any written instrument void and the plan couldn't
7 be confirmed under 1129-A-3.

8 THE COURT: Okay.

9 MS. JARVIS: And Your Honor, our position is
10 that the fiduciary under the plan is the company. The
11 company, we've carved that out so we clearly have a
12 claim against them, but that that should not extend to
13 the CRO that has come in to try to clean up this
14 situation in bankruptcy. That this should not extend
15 to, in this pretty unique circumstance of the CRO has
16 come in and try to clean up this bankruptcy, took this
17 pension plan, that the trustee was changed in order to
18 take it away from the former insiders.

19 The company is the fiduciary, not Mr.
20 Allison, not Mesirow. And we think it's appropriate in
21 this case that they be in the release as set forth in
22 the plan.

23 MR. FIELD: And our response to that would be
24 the company is the trustee, but the fiduciary is the
25 decision maker who has the discretion with the assets

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1 of the pension plan, be that Mesirow or the individuals
2 making the decisions.

3 MS. JARVIS: And as you know, Your Honor, we
4 came in and got the Court to order that the pension
5 plan be frozen. So the pension plan is frozen.
6 Nothing is being done with the assets at this point in
7 time.

8 MR. FIELD: But frozen means that benefits
9 aren't being accrued. Frozen doesn't mean that the
10 assets shouldn't be being invested.

11 THE COURT: Well, that's your interpretation.

12 MR. FIELD: That's correct.

13 THE COURT: What would be the position of
14 each side if the release was to Mesirow, except as to
15 anything in which he acted as opposed to failed to act?
16 In other words, we know he hasn't, but let's assume,
17 for example, he was willing to find, but by the same
18 token, so that's one example as to opposed to where he
19 literally did nothing because he wasn't supposed to, or
20 should he? Does that satisfy your concerns?

21 MR. FIELD: No, Your Honor, because under
22 URISA a breach could be acting or failing to act. And
23 there is a fiduciary duty to act as a reasonably
24 prudent trustee or fiduciary, and that would include
25 investing. I mean there are DEO regulations that cover

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1 the duty to invest.

2 THE COURT: Well, wasn't technically, I mean,
3 well, he was the chief restructuring officer. The
4 original principals were still in the case, why aren't
5 they the fiduciaries? Why wasn't it them? Didn't they
6 have the duty as opposed to Mr. Mesirow, Mr. Allison?

7 MR. FIELD: They were the fiduciaries up
8 until September 30th. That's not our issue. Up until
9 September 30th the insiders are the fiduciaries. Our
10 issue is since September 30th, under this release
11 language, in effect there is no fiduciary. There is no
12 one who could be held accountable for any breach of the
13 fiduciary duties. A company is an entity --

14 THE COURT: I can't believe you haven't
15 worked this out. You know full well PBGC is going to
16 appeal it just because they do those things. And
17 they're government and it doesn't make any difference
18 how much money they spend on things.

19 MS. JARVIS: And I see this as very, it's a
20 unique situation. Very unique.

21 THE COURT: It is a unique situation. The
22 point is there probably isn't even any money there.
23 It's only been three months. And I understand why.

24 MS. JARVIS: And Your Honor, of course, the
25 reason why this was done and why we sought this

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1 approval from the Court is, especially the benefits
2 were frozen for the benefit of this estate, so there
3 would be no more accruals of any kind of benefit that
4 the estate might be liable for, and also to make sure
5 that the company as it currently is constituted became
6 the plan trustee rather than former trustee.

7 THE COURT: Well, I suggest you work this out
8 because otherwise, I'm going to have to take this under
9 submission and demand a full briefing from everybody
10 because it involves a URISA issue.

11 MS. JARVIS: Yeah.

12 THE COURT: And that means the confirmation
13 will be delayed. So I suggest you show me the books
14 right now and get it resolved. You may well be right,
15 but I'm not in the position now, I thought sure this
16 was going to be resolved before confirmation. You may
17 need to just talk to somebody else at PBGC. You have
18 been set out with marching orders, "This is our job,
19 this is what we have to do." It's you're just not
20 being very practical about things.

21 MR. FIELD: But I did speak with my
22 higher-ups and our issue, we maintain this is a unique
23 case and it's unique to the PBGC that a debtor was
24 appointed trustee. But our issue is the bigger picture
25 of having plans reorganization releasing pension plan

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1 fiduciaries. We just can't allow that language to be
2 into the plan with that objective.

3 THE COURT: But they're only releasing the,
4 only chief restructuring officer.

5 MR. FIELD: Who may be the fiduciary.

6 THE COURT: But after confirmation he won't
7 be.

8 MR. FIELD: But we still have the period from
9 September 30th until the confirmation where there may
10 have been a breach. And even after confirmation
11 there's nothing in the plan that even says what's going
12 to happen to the pension plan. So if it's not
13 terminated, someone has to be the fiduciary. I mean,
14 the reorganization ignores the pension plan altogether.

15 MS. JARVIS: Your Honor, that was not the
16 issue raised. The debtor, entity of the debtor is an
17 appropriate fiduciary to be appointed as the plan
18 trustee. Mr. Allison was never appointed as the plan
19 trustee. He's not a signatory on the plan. It is the
20 company itself that is.

21 MR. FIELD: The fiduciary doesn't have to be
22 on the plan to be a trustee.

23 THE COURT: Well, if he's not the fiduciary,
24 then clearly, if he's not the fiduciary, then there's
25 no problem not giving him a release because he's not

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1 the fiduciary.

2 MS. JARVIS: And that's where we were
3 yesterday, because we don't believe he is, but the PBGC
4 is saying that.

5 THE COURT: I guess what I'm saying is why
6 should I be the person to determine whether or not he
7 is the fiduciary? If he isn't, if you're right, there
8 is no liability.

9 MR. FIELD: There's no reason why they
10 couldn't accept our proposed language and in the future
11 argue he's not a fiduciary and that this language
12 doesn't apply to him.

13 MS. JARVIS: We tried to work it out so we
14 have a clear understanding whether he is or is not.

15 MR. FIELD: But we simply don't have the
16 facts, we haven't done an audit of the plan.

17 THE COURT: Why would you not go to trial to
18 do that to determine now who would be the fiduciary? I
19 can't confirm a plan with this issue out there. I can
20 tell you what to do and everything else, but.

21 MS. JARVIS: Okay, we'll work it out, Your
22 Honor.

23 THE COURT: Okay. Anything else on the plan?

24 MR. MEROLA: Frank Merola of Stutman,
25 Treitser & Glatt on behalf of First Trust Deed

1 Committee. Your Honor, the debtors met last night with
2 its professionals and all the committees and their
3 professionals and discussed at length the proposal Your
4 Honor made at the end of the hearing, which essentially
5 is for a consensual modification of the plan to carve
6 out certain objecting parties from the compromise and
7 allow us to commence litigation against those objecting
8 parties.

9 After a great deal of discussion, we've
10 concluded that doesn't work and I'd like to explain
11 why. As Mr. Garman so wonderfully put it yesterday,
12 the compromise from the standpoint of a direct lender
13 has many interrelated components. Yesterday we spent
14 most of the day focusing on the compromise as it
15 related to prepaid interest. And when everyone was
16 talking up here yesterday, they were talking about
17 being sued for the prepaid interest. There's a couple
18 of issues that relate prepaid issues and setoff that
19 would relate investor by investor.

20 There are a number of other components of
21 this compromise that are actually estate-wide. So, for
22 example, you're not going to try to subsequently
23 consolidate the direct lenders. You're not going to
24 try to recharacterize all of those issues. You're not
25 going to have a 506 C surcharge. We can't resolve

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1 those issues globally if we allow some people to carve
2 out, because the net result will be that those people
3 that carve out will get the benefit of all of those
4 global aspects of the compromise for nothing. And the
5 problem is that we need the global aspects of the
6 compromise to make the plan work as a whole.

7 What Mr. Garman's constituency negotiated for
8 is the piece for the direct lenders, that no one is
9 going to try to make their assets property of the
10 estate. If we have to live by all of that, even if you
11 carve out five or ten or fifteen people that we sue.
12 And what we're concerned about is the prophecy in
13 Mrs. Cangelosi's solicitation that said, "Vote no on
14 the plan, you'll get all the benefits and we still will
15 get to keep prepaid interest or we'll get a chance to
16 litigate. We'll come to fruition."

17 So we're here today, the four committees and
18 the debtors, to ask you to confirm the plan with the
19 compromises as is. We had a great of discussion about
20 Your Honor's concerns on appeal. We have evaluated
21 those issues and we're requesting confirmation of the
22 plan. Consistent with Your Honor's request at the end
23 of yesterday's hearing, we're prepared to put on
24 additional argument regarding the procedural issues and
25 the compromise. Thank you.

1 THE COURT: Oh, I didn't know if you were
2 standing for some other reason or you were going to
3 make a point.

4 MS. CARLYON: I'm the person that would put
5 on that argument.

6 THE COURT: Oh. I don't need that. I wanted
7 to know first whether or not you were going to make a
8 consensual modification. As I indicated yesterday, my
9 concern, and I wasn't sure it was a mere legal concern
10 or a practical concern, as I articulated my concern was
11 in large measure a practical concern of how do you make
12 this plan go without appeals and resolve that issue.
13 But having, please stop rustling papers on the phone.
14 Put your phone on mute. Is this Court Call that's
15 doing this today?

16 THE CLERK: Yes, Court Call.

17 THE COURT: So subject to the PBGC problem,
18 I'm prepared to confirm the plan. And let me address
19 the large issues first, then I'm going to go through
20 all the findings that relate to the findings necessary
21 under a 1129. Let me first talk about the compromise
22 and its binding effect on those who neither voted for
23 the plan and/or objected.

24 First, and let me backtrack to say again the
25 obvious. I think a part of the problem in this case as

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1 far as people understanding what's happening and some
2 of the misinformation that's been communicated is by
3 the euphemism that we've used, prepaid interest. It
4 isn't prepaid interest. That was a mere euphemism. I
5 mean, you can define a term as anything you want and
6 it's appropriate to define that term, the plan, as
7 that. You know, you can define a cat as a dog as long
8 as that's what the definition is.

9 And we've used this euphemism of prepaid
10 interest throughout the case, I guess to kind of soften
11 the blow of the fact that this money had no basis in
12 law to the case. What happened was that this money was
13 not paid by the borrower. A direct lender only had
14 rights to receive monies paid by the borrower. Now, if
15 this money wasn't due to go under from the servicer,
16 there was no guarantees and there wasn't any separate
17 obligation. Indeed, it's even unknown whether or not
18 some of that, quote, interest, that was paid would ever
19 be paid, for several reasons. One, what if we assume
20 that the loan was a borrower who went into bankruptcy
21 and let's assume it's under secured. There wouldn't be
22 a right to prepaid interest, post-petition interest.

23 Some of these loans were null in bankruptcy
24 at some point along the way. Alternatively, interest
25 might never, ever be paid because, or due because the

1 borrower defaulted, never paid and the foreclosure
2 happened, and the only money that resulted was enough
3 to pay the principal and not interest.

4 So when we talk about prepaid interest it's a
5 fallacy. It's nothing more than a windfall to the
6 person who received it. And windfall is in a sense a
7 bad word, because I don't mean to suggest that these
8 people, and most people would seem, if not all,
9 received the money in good faith. Whether or not they
10 should have or could have done further investigation is
11 beside the point. But the point is they had no
12 contractual right to receive that money. They had no
13 legal right to receive that money, meaning under Nevada
14 law it is illegal for the servicer to pay a lender when
15 the borrower hasn't paid.

16 Now, it's been argued that that's something
17 that is a criminal penalty, but it seems to me if you
18 receive something that the law says you may not
19 receive, and by law I mean not by the contract or the
20 statute, I mean criminal law, it means your defenses
21 are much slimmer because it's against public policy for
22 those payments to be made.

23 So with that in mind we're looking at, all
24 right. People received money they weren't entitled to
25 receive. How is that situation rectified? One way in

1 which it could have been rectified is for the debtor to
2 file a lawsuit against everyone that received that
3 money. Now, clearly I think they would have been
4 entitled to a prejudgment writ of attachment because
5 money was coming in their hands in the future. And
6 more importantly, they would have received a judgment
7 for that amount of money. If it was less than ten
8 thousand, you're entitled to attorney's fee under
9 Nevada law, or maybe it's 20,000 now. If it's less
10 than a certain amount you're entitled to attorney fees
11 under Nevada law. And the judgment would have been a
12 personal liability. But rather than going to that the
13 committees and the debtor got together and thought
14 what, is there a better way of getting this money back,
15 but also relieving those lenders from other debts that
16 they may owe to the estate and/or rights they may lose?
17 And the answer was a compromise. The compromise
18 clearly meets the factors of A&C Properties, which is a
19 Ninth Circuit case that deals with when a case should
20 be compromised. There will be expensive litigation,
21 you look at the complexity, look at the benefits.

22 Here the direct lender's benefit because
23 they're not going to be sued under the theory that
24 there are other loans, that their loans are not really
25 their loans. And there's indeed an argument that

1 Diversified or others might make to say I'm sorry, you
2 thought you had a direct loan. You thought it's not
3 property of the estate. But there is an argument in
4 light of the way then things were done the and monies
5 were all commingled, it's not your property. It's the
6 property of the estate and we all share.

7 Now, concededly, I think everybody realized
8 that maybe isn't the strongest argument, but it is a
9 legal argument with factual support. Alternatively,
10 one could argue the subject of consolidation because
11 these entities diverted monies back and forth and
12 monies were commingled. If that was the case, then
13 that might mean assets would be shared. Other
14 arguments are that the contracts clearly provided that
15 servicing fees were to be paid over a period of time
16 and apparently they weren't. So that is being given
17 up. So it is a fair compromise.

18 Now, can this compromise be effected on those
19 who do not accept and/or object? And this is the part
20 that was troubling me. But in reviewing the cases,
21 reviewing the points and authorities and thinking about
22 it further I believe that you can, notwithstanding the
23 fact that they have objected. And we get there several
24 ways. First of all, since the code tells us that we
25 can effectuate a compromise through a plan under 1123

1 B-3, that's got to mean something. I mean, it if just
2 means a compromise between one person who has a claim
3 and the estate, then you can just do that through a
4 motion.

5 I think the compromise envisions much like a
6 class action settlement. In other words, class actions
7 are often used as a way of doing it since class action
8 litigation has been modified. We know we can do class
9 action settlements much like that. We also know that
10 you can modify the rights of secured creditors. Now,
11 it's a little different in this case because they're
12 secured as to the lender as to opposed to the estate,
13 but we know that rights can be modified. Also, we know
14 that through the plan process creditors can, in other
15 words, it's the class of steps. They can receive, for
16 example, 25 cents on the dollar instead of 90 cents on
17 the dollar. And that's done through a class process.
18 This is really the same thing. This is really saying
19 how is my claim adjusted? What do I get in the future?
20 How do I adjust what I owe and they owe me? So I think
21 it's appropriate.

22 I do think that A-5 is a class that can vote
23 and it's properly voted. Now, it would seem to me that
24 that argument that A-5 is not a proper class to vote
25 has been waived because it was not properly objected

1 to, nor appropriately raised. But even if, I believe
2 that A-5 is a class that is entitled to vote is because
3 it has claims, it has rights to equitable relief in the
4 true sense of the word. So it has claims.

5 Now, just so I don't forget to mention, I
6 think I have it in my notes, that would eliminate the
7 issue concerning the Bunch vote, but if the Bunch vote
8 is, if the claim is, if the claim is not temporarily
9 allowed for voting purposes that means class A-4 would
10 have consented as well. I think it's also appropriate
11 because the settlement does not, adversely affects the
12 right to settle.

13 Let me add one other thing vis-a-vis the
14 rights to the compromise. The compromise and why an
15 adversary is not required. Not only is a compromise a
16 compromise, but it's recoupment. It's strictly
17 recoupment, which doesn't require an adversary
18 proceeding.

19 Similarly, for example, in the servicing
20 agreement the lender agrees that if U.S.A. pays
21 expenses or advances sums to protect the lenders'
22 interest in the note and deed of trust, U.S.A. may
23 advance the fee and any fees advanced shall be paid
24 back from the proceeds of the foreclosure. Now, I
25 recognize that that goes to foreclosure, but I see no

1 reason why the same principal isn't true when you
2 received a payment for which you weren't entitled under
3 the note. So it's not, an adversary is not required
4 for recoupment.

5 What about setoffs? First of all, we know
6 that setoff is an accountable right and it's
7 discretionary. And in this case I don't believe that
8 setoff would be appropriate. Now, it's a little
9 unclear who would have these setoff rights, and part of
10 the problem is we had people representing numerous
11 lenders, and I'm really unclear if they really do have
12 diverted principal as well as direct lender retention
13 claims, but let's assume they do. Setoff would be
14 inappropriate because it would create unfair treatment.
15 If we compare someone who had principal that was
16 diverted, but did not receive any prepaid interest,
17 either because their borrower was paying on the other
18 loans or they only had the one loan, and that person
19 would just get their percentage of what the pot was
20 going to be. But if a person had diverted principal
21 and the direct lender claim for which they received,
22 they would receive more than if they had the setoff.
23 They would be allowed to keep under their theory, the
24 interest to which they were not entitled and get the,
25 diverted, their share of the diverted principal. So

1 they would be getting more than the person who only had
2 the one loan.

3 Also, as we knew under 502 D, a claim is
4 disallowed and no payments made until such time as any
5 payments due under the trustee's powers are repaid. So
6 that to me is analogous in disapproving a setoff. I
7 also agree and I would incorporate the arguments
8 concerning mutuality that have been set forth in page
9 19 of the reply brief.

10 Now, let me go through more mundane, oh, I'm
11 sorry. The executory contract. I also find that these
12 are not executory contracts. As I stated yesterday and
13 I think Mr. Smith was saying, that everybody shuffles
14 their feet and you say it's not executory, it is an
15 executory, it's not an executory contract. Well, I
16 think the problem is as we all have initial thought
17 that, depending how much we've really thought about
18 this and I've got to admit that every time I read about
19 the countryman's definition my eyes sort of glaze over,
20 the first reaction is every contract has to be an
21 executory contract if it's a contract. That analysis
22 is totally superficial and legally wrong. I think the
23 Helms case proved that point. It was an option
24 contract. Wouldn't one think that an option contract
25 where A and B were involved would be an executory

1 contract? And the answer is no because the point is
2 the option was given, there's no other performance due
3 on the other side other than just say yes.

4 And the point is in order to be an executory
5 contract, and let me adopt the arguments on page 31 of
6 the reply brief. An executory contract is one, quote,
7 "on which performance remains due to some extent on
8 both sides." As the quote went on it said in Helms,
9 "More precisely, a contract is executory if the
10 obligations of both parties are so far unperformed that
11 the mere (sic) of either party's complete performance
12 would cause a material breach and thus excuse the
13 performance on the other." Here this is nothing, while
14 it's true the debtor owed duties to the direct lenders,
15 the direct lenders had no obligations to perform. The
16 contract was signed and to suggest that, well, if the
17 lender wanted to buy me out I have to give title,
18 that's been overruled. I mean, that concept has been,
19 I think overruled by Helms, that that is not the kind
20 of breach that's a material breach. And indeed, in the
21 Lemmons case the mere requirements you give a deed is
22 not something that constitutes, it's not the kind of
23 thing that is within the definition of executory
24 contract.

25 Similarly, the other alleged obligations just

1 don't rise to that level. The obligation to, well, I
2 think they talked about the payback money, but that
3 wasn't to pay back, it was just withheld. And the
4 giving of documents to close title, it's just a
5 ministerial duty and in any case, they've already given
6 those rights to the powers of attorney. So it is not
7 an executory contract and can therefore be transferred
8 without process of assumption and assignment.

9 Now, let me go through the more mundane
10 findings, and quite frankly, what I intend to do is
11 incorporate as my findings the evidence submitted by
12 Mr. Allison. So let me summarize, but let me indicate
13 that I do incorporate his statements made in page two
14 through 37 of his affidavit, make those findings.
15 Obviously, I'm going to try and go through these,
16 obviously where he says someplace. It's my belief
17 since if I had no countervailing evidence I would make
18 a finding that that is the fact.

19 In summary, I find that the plan complies
20 with all the applicable provisions of the bankruptcy
21 code. Section 1129 A-1 is complied with. 1122 has
22 been complied with for the basis set forth and the
23 factual findings that he has set forth. I previously
24 spoke about A-5 and I do find that A-5 is a proper
25 classification and a proper vote. I find 1123 has been

1 complied with for the reasons set forth in these
2 affidavits and so find. I find that 1129, A-2 has been
3 complied with for the reasons set forth in his, and
4 make the finding set forth his affidavit. I find the
5 solicitation of votes was in compliance. I find 1129
6 A-3 has been complied with for the reasons set forth.
7 In paragraph D-2 I find that the sales of the assets
8 was an arm's length transaction. I find that 1129 A-4
9 has been complied with and adopt as my finding the
10 evidence set forth by Mr. Allison. I find that 1129
11 A-5 has been complied and adopted as my findings the
12 evidence set forth by him and to the extent that his
13 affidavit was one to the best of his knowledge, since
14 there's no contrary affidavit I make the findings that
15 he has suggested, including the appointment of Mr.
16 Tucker and Mr. Berman. And each of those is in the
17 best interests, is appropriate. I find that 1129 A-6
18 has been met because it's inapplicable. I find that
19 the liquidation analysis demonstrates that each, that
20 that has been met and adopt the evidentiary statements
21 that he has set forth as findings. On page 14 I find
22 that the objection by the insider equity interest has
23 been stricken. But in any event, I find that there is
24 no evidence to support the contingent that U.S.A. CM
25 creditors would be paid hundred percent such that there

1 would be no possibility of any distribution to the
2 insider equity interest such that the requirements of
3 1129 A-8 were met and that the plan is fair and
4 equitable to the insider equity interest, and that
5 their interest be cancelled upon the effective date.

6 Again, I find 1129 A-8 has been met and adopt
7 and the findings set forth by Mr. Allison's evidentiary
8 affidavit. I find 1129 A-9 has been met and adopt the
9 evidence that, as my findings as Mr. Allison has set
10 forth. I find 1129 A-10 has been met and adopt his
11 findings, and I find that A-5 has voted to accept the
12 plan. I voted that the classes set forth in the ballot
13 summary have voted in accordance with that ballot
14 summary.

15 A-4 is the only class that we don't know at
16 this stage, but as I indicated, that is not required
17 for a finding since A-4 is receiving as much as they
18 would in liquidation and the plan can be crammed down,
19 even if their ballot is meant to reject because it's
20 fair and equitable to them. And there would be A-7 as
21 well as a fair and equitable requirement, not only
22 because no junior class is receiving or retaining
23 anything, but as well is fair and equitable in the
24 larger context of equity.

25 I find that 1129 A-11 has been met and adopt

1 the findings of Mr. Allison. I find 1129 A-12 has been
2 met and adopt the findings in his affidavit. I find
3 1129 A-13 has been met and adopt his findings, I mean,
4 adopt his evidence as findings. A-14 is not
5 applicable. A-15 is not applicable. A-16 is not
6 applicable. And I misspoke before. I find that the
7 claim complies with applicable provisions in 1129 B,
8 which is a cram down, and adopt those findings
9 including the findings that I previously made in
10 connection with my other statements.

11 With respect to the sale, I adopt the
12 evidence support of Mr. Allison and find that the
13 debtor has undertaken efforts to explore the options.
14 I find that the bid procedures order was served. I
15 find that all of the procedures have been followed. I
16 find there has been benefit to the estate. I find that
17 it's in the best interests of the debtors' estates,
18 there is sound business justification for the sale,
19 that notice of sale was reasonable, the purchase price
20 is fair and reasonable, the sale is made in good faith.
21 I specifically make the findings that Compass is not an
22 insider, does not have any pre-petition or
23 post-petition affiliations with any debtors, major
24 creditors, holders of equity interest or any of the
25 former or current officers or directors. I find that

1 the sale is not the result of product collusion or any
2 attempt to take unfair advantage and I find that
3 Compass' asset purchase agreement represents the
4 culmination of substantial good faith arm's length
5 negotiations among the debtors, the committees and
6 Compass, and I find that Compass has provided evidence
7 demonstrating the good faith in accordance with the bid
8 procedures order and that Compass has the ability to
9 service the accounts in accordance with the asset
10 purchase agreement.

11 I adopt the findings of the inner company
12 compromises and find that they are fair and reasonable
13 as I indicated before, and I adopt as findings of facts
14 concerning the objections to confirmation, and in
15 particular the facts which I've indicated previously,
16 that the funds did not come from a particular bar, it
17 was made to direct lenders. And I'm summarizing. His
18 facts laid them out more carefully. And that the money
19 is impossible to trace and that the funds, there was a
20 negative book balance and that the payment of those
21 funds to direct lenders came from various sources other
22 than the particular borrowers to which they were made,
23 made on account of.

24 So subject only to resolving the pension
25 benefit guarantee issue, I will confirm the plan.

1 MS. JARVIS: We resolved it, Your Honor.

2 THE COURT: Okay.

3 MS. JARVIS: We'll go ahead and go with the
4 language. Let me just read it that we've agreed to.
5 That we will add into the confirmation order.

6 Notwithstanding any provision of the liquidating plan,
7 nothing shall release any claim or claims that PBGC or
8 any pension plan currently or formerly sponsored by the
9 debtors against any person arising under 29 USC,
10 sections 1104 to 1109 with respect to the pension plan.

11 THE COURT: And that's acceptable to PBGC?

12 MS. JARVIS: Yes, Your Honor.

13 THE COURT: Okay. Thank you. Let me just
14 add in conclusion, I know how hard, I can't say I know,
15 I can understand how difficult people's feelings must
16 be in this case and the trauma they have gone through
17 and will go through, and I appreciate that. And I
18 appreciate the fact that Mr. Smith has, you know,
19 represented his clients in the best manner possible.
20 But there is no easy answer, but I think this solution
21 is appropriate under the bankruptcy code, appropriate
22 on all of the facts and circumstances, and does the
23 best job possible to make the best of a terrible
24 situation.

25 Hopefully, Compass will be able to, as in the

1 servicing capacity, be able to start collecting on some
2 of these loans that were past due. Perhaps the estate
3 will be able to recover assets that were
4 misappropriated along the way. And I appreciate
5 everybody's efforts, and although it may have been
6 harder on some people, and Mr. Smith, I apologize to
7 you, but, you know, it's part of the process. It's
8 nothing personal. I know you were trying to do your
9 best job representing your clients, and you did a good
10 job of that. The fact I disagree doesn't take away
11 from that.

12 MR. MEROLA: Your Honor, we all want to get
13 to maximizing value for the constituencies in this
14 estate. And consistent with that, we would like to go
15 back to the ten-day stay issue not on the confirmation,
16 but solely as it relates to the sale transaction.

17 THE COURT: Oh.

18 MR. MEROLA: Which we have no objections to.
19 So we would like a limited waiver to give the debtor
20 the optionality, I'm not saying it's going to close in
21 ten days, but to give the debtor the optionality that
22 the stay will not apply as it applies to the provisions
23 of the order related to the sale.

24 THE COURT: Sale. Okay.

25 MS. JARVIS: Your Honor, also one

1 clarification. I think Your Honor made all the
2 currents and findings, but my understanding is from the
3 findings that you made, that you will give a 363 M
4 finding with respect to the sale.

5 THE COURT: I didn't say the word, but yes.

6 MS. JARVIS: You didn't specifically say that
7 and that's why I was just asking and clarifying. I
8 assumed that you intended that.

9 THE COURT: Yes. I didn't make magic words,
10 but you're right.

11 MS. CARLYON: Your Honor, can I ask for a
12 clarification on two of the findings?

13 THE COURT: Sure. Let me have Mr. Smith's
14 comment. You have a comment on the ten days?

15 MR. SMITH: Sure. Couple of things, Your
16 Honor, yeah. The ten days, I'm concerned whether that
17 creates some kind of a strategic advantage. I haven't
18 really thought about it, but I just don't want, I'm not
19 sure I want to appeal it or not, but I don't want to be
20 prejudiced in having that ten days to appeal if I want
21 to. I don't know any rigid circumstances that require
22 it to be shortened.

23 THE COURT: Well, the sale. The thing is --

24 MR. SMITH: Well, it's interrelated, but if
25 you do the sale, I'm not sure it might prejudice some

1 sort of appeal right that I might have. Frankly, as I
2 sit there and heard it I haven't really thought it
3 through. The second thing I want to ask you is when we
4 address the ability of direct lenders terminating the
5 service agreement, and then Counsel for Compass stood
6 up and I couldn't quite hear it and I canvassed other
7 people, so I wanted to ask you if I could. Where are
8 we on that? I'm just not sure.

9 THE COURT: Do you want to repeat for the
10 record what you said yesterday?

11 MR. SMITH: Thank you, Your Honor.

12 THE COURT: So we have it all in one spot?

13 MR. DAVIS: Sure, Your Honor. I'll do my
14 best. I don't have all of the notes in front of me,
15 but what we are intending to do and what we're willing
16 to accept is to the extent that there is a direct
17 lender that had a right that was matured as of the
18 petition date to replace the servicer based upon the
19 failure of U.S.A. to perform as the servicer, not
20 because of diverted principal or anything like that,
21 that we are willing to take, subject to those limited
22 rights, but in all other respects we take free and
23 clear, liens, claims, encumbrances, setoff rights,
24 improvement rights, monetary and non-monetary defaults,
25 et cetera. And we had certain provisions to deal with,

1 or certainly agreements to deal with a dispute
2 concerning whether there was a right or wasn't a right
3 to replace the servicer. There's a 30-day provision in
4 section eight of the agreement, we agreed that Compass
5 would be provided 30-days' written notice as provided
6 in the agreement. We'd have the opportunity to the
7 extent we wanted to challenge to bring up before Your
8 Honor, depending on Your Honor's ruling on that, the
9 effectiveness of any attempted replacement of Compass
10 as servicer would be effectively stayed, pending your
11 ruling. And further, that notwithstanding that we're
12 taking subject to this limited right, in all other, and
13 in all respects Compass has the right and ability,
14 Compass has the right and ability to enforce the
15 agreement as though it took free and clear of all
16 monetary, non-monetary defaults.

17 THE COURT: Okay. Thank you.

18 MR. SMITH: Still, Your Honor, just so that
19 my silence is not a waiver, I don't, I disagree with
20 that. I think they take subject to whatever defaults
21 existed of whatever nature and can't be limited in any
22 way. But my question was, is are you, is this Court
23 retaining jurisdiction over those issues if somebody
24 wants to terminate the service agreement?

25 THE COURT: If it's in the plan, I will. If

1 it's not in the plan, I won't.

2 MR. GORDON: Let me, paragraph three provides
3 for termination in the event that U.S.A. did not force
4 the, let's call it foreclosure rights or enforcement of
5 rights, question rights. That survives. Obviously,
6 the LSA survives. The LSA does not provide for any
7 provision, any remedy or any procedure in the event
8 there's a dispute. So what we agreed to with Compass
9 was, obviously paragraph three we recognize. And
10 obviously, to facilitate if a dispute arises because
11 the LSA does not provide for, that this would be the
12 Court by which the parties would come for a quick,
13 hopefully speedy, and expeditious and cheap resolution
14 if a dispute arises.

15 So we're completely consistent with the LSA.
16 We have expended in touch by providing this remedy or
17 this form, for that matter.

18 MR. SMITH: And is that form, are you saying
19 it's in the plan or is it elsewhere?

20 THE COURT: I think it would be modified and
21 put in the plan.

22 MR. GORDON: It will be in the confirmation
23 orders and in the findings.

24 MR. SMITH: And would that also include the
25 rights in paragraph eight of the servicing agreement as

1 well that survives or what part?

2 THE COURT: All the agreement survives.

3 MR. GORDON: The entire agreement survives.

4 MR. SMITH: Okay.

5 MR. GORDON: But what Compass wanted to know
6 was several things. One is that they were taking free
7 and clear in essence what we call the other monetary
8 and non-monetary rights. That's fair. They want to
9 know that if the purchase assets default, interest, et
10 cetera, that if the document is transferred to a third
11 party that their rights are preserved, they can't be
12 prejudiced. And they also want to know that other
13 defaults by, such as which could rise to monetary
14 damages such as recoupment or breach of contracts
15 damages, they're not liable for. That's fair also.

16 MR. SMITH: I understand. Thank you.

17 MR. KIRBY: Your Honor, Dean Kirby on the
18 telephone.

19 THE COURT: Uh-huh.

20 MR. KIRBY: I just wanted to note for the
21 record that as you know, our client has opposed the
22 sale. We don't believe that these contracts can be
23 sold free and clear of any of the rights of the
24 counterparties and we're not agreeing to the settlement
25 or agreement that's been worked out with the

1 committees.

2 THE COURT: That's fine, but that objection
3 has been overruled. And I need to say that. I'm
4 overruling all the objections to the plan that haven't
5 been dealt with PBGC has just modified.

6 MR. KIRBY: I understand, Your Honor. I just
7 didn't want my silence to be interpreted as consent to
8 that.

9 THE COURT: Okay. Thank you.

10 MS. JARVIS: Your Honor, to clarify the last
11 decision, the retention provisions in the plan are very
12 broad and when we add into the confirmation order this
13 issue with respect to this Court retain jurisdiction
14 over disputes with respect to the termination of the
15 loan servicing agreements, it is merely clarifying what
16 is already a very broad interpretation of the
17 jurisdiction provision of the plan.

18 THE COURT: Mr. Merola, Mr. Herman?

19 MR. MEROLA: I'm going to try again. Your
20 Honor, I'll make an offer of proof that in selecting
21 the highest and best offer, each of the committees and
22 the debtor considered the certainty of close. The
23 ultimate certainty of close is to close the
24 transaction. For whatever internal accounting reasons
25 related to the calendar year, which I can't speak to,

1 Compass is highly motivated to close this transaction
2 now. Secondly, the purchase and sale agreement with
3 Compass provides that the purchase price for the U.S.A.
4 Commercial Mortgage assets is reduced dollar for dollar
5 for each dollar collected from the auction date to the
6 close. The longer it is to the close, the lower the
7 purchase price is under that.

8 THE COURT: Yeah, but you would be able to
9 keep what you collected.

10 MR. MEROLA: I understand, Your Honor, but
11 the purchase price does change.

12 THE COURT: Now --

13 MR. MEROLA: I do not think it is highly
14 likely that this transaction will close within the ten
15 days. I have been requested by multiple parties to see
16 if we can get the flexibility to close the transaction
17 within the ten days, if possible.

18 THE COURT: The thing I want to know is if
19 there is an appeal to the confirmation order, how would
20 that affect, I mean, would they close notwithstanding
21 the fact that the confirmation order wouldn't have been
22 entered yet? And Mr. Smith has a fair point. He
23 doesn't want to be prejudiced in his rights. I mean,
24 you know, if it really is going to affect it, then we
25 really need to know that.

1 MR. MEROLA: Well, absent the stay, Your
2 Honor, we will do everything we can to consummate all
3 the transactions provided for under the plan, including
4 the purchase and sale. I would argue, Your Honor, that
5 the possibility of an appeal of the confirmation order
6 is yet another reason to give Compass the flexibility
7 to close, because I don't want to be in the situation
8 where they're using the fact that the confirmation
9 order is not final, which is required under the
10 purchase agreement, to start negotiating purchase price
11 or continue the closing.

12 THE COURT: So they're willing to close even
13 though the confirmation order is not final? Are they
14 waiving that requirement? That's really the answer.

15 MR. MEROLA: If that's the case. That may be
16 the case.

17 MS. CHUBB: It may be, but I was going to
18 suggest that the ten days not be waived, but shortened
19 so they can close on the 29th if they want to if we
20 don't have a stay.

21 THE COURT: Well, you know what? Today is
22 the 20th. Ten days from now is the 31st.

23 MS. CHUBB: That's on a weekend, though. So
24 they probably couldn't close. So I'm suggesting if we
25 haven't gotten a stay by the 28th, they can close on

1 the 29th.

2 MR. DAVIS: Your Honor, you asked whether or
3 not we would be willing to waive the formality of the
4 confirmation order. The answer is yes, since Your
5 Honor has already granted us protection under the 373
6 M.

7 THE COURT: Oh, okay.

8 MR. SMITH: Your Honor, my concern is the
9 practical issue. My concern is a practical mootness
10 issue. I know things take place in furtherance of the
11 plan, that may tend to prejudice me. I'm not saying
12 I'm going to take appeal, but if things go forward
13 pursuant with the plan, I'm sure I'd be faced with
14 an argument, "Look, Mr. Smith. You can't unwind what's
15 already been done." The Compass sale has already been
16 closed. It can't be unwound. It's part of the
17 overall.

18 THE COURT: Except you never objected to any
19 part of the sale aspect.

20 MR. SMITH: Well, I objected to the plan. So
21 I don't want to be prejudiced in that objection by
22 saying, "Look. The plan has already been implemented
23 so there's nothing you can do." That's the sole reason
24 why I'm objecting to shortening that period. And I
25 appreciate everybody would like to close earlier, but

1 Compass bargained to close by the end of January. So
2 it's not like it's a big surprise to them. And I'm
3 concerned about the attempt to move it up and gain some
4 sort of advantage to effect any appeal that might be
5 filed.

6 THE COURT: Okay.

7 MS. CHUBB: Your Honor, we'll check with our
8 clients to make a decision that we're not appealing,
9 then we'll be happy to tell them if they want to close
10 before the 29th.

11 MR. MEROLA: I think Ms. Chubb's suggestion
12 is an excellent way to split the baby. My only request
13 if the stay is not obtained by the 26th, that would
14 give us two business days in that week, because the
15 Friday before is going to be difficult to close on.

16 MR. SMITH: I don't really look forward to
17 spending my Christmas day working on a motion for a
18 stay. If you order it I'll do it, but the 26th is the
19 day after Christmas. That essentially gives us two
20 days. That's not going to work, Your Honor.

21 MR. MEROLA: It gives them all of next week,
22 Your Honor.

23 MR. SMITH: There's no exigent circumstance
24 that causes this to happen, other than they would
25 really like to do it.

1 THE COURT: Well, since it's only the sale
2 I'll shorten the time to the 27th at noon. That's
3 really splitting the baby.

4 MS. CHUBB: Your Honor, it's supposed to be
5 ten days.

6 THE COURT: You're the one that suggested the
7 shortening time.

8 MS. CHUBB: I did, and I suggested shortening
9 it to the 29th, not to the 27th.

10 THE COURT: You said 28th.

11 MS. CHUBB: I said if we didn't have a stay
12 by the 28th they would be able to close on the 29th.

13 MR. MEROLA: Close of business on the 27th
14 and we're closing. That game's over.

15 MS. CHUBB: That's what you say.

16 THE COURT: This is just on the sale aspect.
17 They're waiving a formality requirement. It seems to
18 me the benefit of the estate.

19 MR. SMITH: It is, Your Honor, but I can just
20 tell you the first thing I'm going to face on an appeal
21 if I bring one is there's nothing to do now. The sale
22 is closed.

23 THE COURT: But you didn't argue anything
24 about the sale. You argued about how the money is paid
25 out.

1 MR. SMITH: I don't think I needed to do
2 that. I get ten days until you shorten it.

3 THE COURT: I understand.

4 MR. SMITH: And in this ten days if you allow
5 something to happen that is going to make my appeal
6 practically moot, then I'm really prevented from
7 appealing. Your Honor, that's really what is being
8 attempted.

9 THE COURT: I don't think to remove this
10 doctrine would affect that because there are certainly
11 ways, what is effected is the way your clients are
12 paid, not the sale.

13 MS. CHUBB: How about this? They wouldn't
14 raise the mootness issue?

15 THE COURT: Is there an objection to raising
16 the mootness issue?

17 MR. MEROLA: We're not going to waive the
18 mootness issue.

19 MS. FREEMAN: Susan Freeman. No, we're not
20 going to waive anything.

21 THE COURT: Well, then I think if you're not
22 willing to waive that, then I guess I can't.

23 MR. MEROLA: Fine, Your Honor.

24 THE COURT: Okay. Sorry, Mr. Herman?

25 MR. HERMAN: Your Honor, hopefully by way of

1 just a housekeeping point of view, but the Diversified
2 Fund is a direct lender. The Diversified Fund did not
3 sign up for the compromise embodied in the plan. And
4 we still have outstanding issues with Mr. Charles and
5 Miss Freeman. We continue to try and work out those
6 issues.

7 THE COURT: Well, you're bound to the plan
8 like everybody else is. Okay.

9 MR. HERMAN: That's exactly right, Your
10 Honor, but we are not a party to the compromise. So I
11 would just like some clarification that the Court's
12 rationale was really in support of approving the
13 compromise and not things that are binding on other
14 parties in the case who --

15 THE COURT: But you're in that class. You're
16 bound like everybody else. You're in that class. I
17 know you said you wouldn't agree to it unless you
18 objected. That's why I asked the question yesterday.

19 MR. HERMAN: By the terms of the plan, Your
20 Honor.

21 THE COURT: Yes. You're bound by the terms
22 of the plan.

23 MR. HERMAN: Diversified Fund is not a member
24 of the A-5 class.

25 THE COURT: But to the extent of those claims

1 you are.

2 MR. HERMAN: That's not the way the plan is
3 drafted, Your Honor. This is not a controversial
4 issue.

5 THE COURT: It is.

6 MR. HERMAN: We've already, well, amongst the
7 professionals it's not.

8 THE COURT: Well, it is. If you want to be
9 treated differently, you're no different than
10 Mr. Smith's client.

11 MS. JARVIS: I think, Your Honor, in fact
12 maybe, I think I understand what he's saying. With
13 respect to the substantive consolidation, that issue is
14 gone. I think specifically he's dealing with the
15 Court's determination with respect to the compromise,
16 which the compromise may have included a compromise on
17 offsets. There are some separate issues. Diversified
18 did not vote in the A-5 class because it's a separate
19 debtor estate. And I think with respect to those
20 findings in the U.S.A. Commercial Mortgage estates he's
21 simply asking since they didn't vote in that plan,
22 we're not on that side, that they retain that.

23 THE COURT: Right, to the extent that they
24 had a claim as a direct lender, I think they are. You
25 can find it out later if you want, but.

1 MR. MEROLA: Well, that's all we're asking,
2 Your Honor. That's as to the plan.

3 MR. HERMAN: We have additional facts to
4 present to the Court. There are additional arguments,
5 there are differences to the foreclosure --

6 THE COURT: But the point is to the extent
7 you're a direct lender and fit within A-5, whether you
8 loan or not, you're bound by the plan like everybody
9 else.

10 MR. HERMAN: Of course, but I think that we
11 can demonstrate to the Court that that wasn't the
12 intent of the plan. That's all I'm asking, is the
13 Court's rationale for approving the compromise is not
14 binding upon a party who is not a part of the
15 compromise.

16 THE COURT: It is. That was Mr. Smith's
17 problem. Mr. Smith said, "I'm not a part of this
18 compromise. I didn't agree to it." It is.

19 MR. HERMAN: Let me rephrase, Your Honor. A
20 party who is not under the plan purported to be bound
21 by the compromise. I'm not trying to change anything,
22 I'm not trying to change anything in the plan, I'm not
23 trying to change anything in the form of orders.

24 THE COURT: It seems to me if you are someone
25 whose claim fits within A-5, you are bound just like

1 every class member. Maybe you are going to litigate it
2 later, but that's my view.

3 MR. HERMAN: We understand that's your view.

4 THE COURT: But you're here and you didn't
5 file an objection to the plan.

6 MR. HERMAN: And we're willing to live by the
7 terms of the plan, it's just that --

8 THE COURT: So don't ask me for clarification
9 of what you think the plan does to you.

10 MS. JARVIS: Your Honor, if I could just
11 help, the direct lender and the way it is confined in
12 plan specifically excludes USCA, ACM and the fund. So
13 Diversified is a fund he's excluded from the definition
14 of direct lender. So I think --

15 THE COURT: The plan says whatever it is.

16 MR. HERMAN: That's exactly right, Your
17 Honor. That's all we're asking for. Thank you.

18 MS. CARLYON: Sorry, Your Honor. I just had
19 two brief sections I would ask that the Court might
20 clarify the findings. With regard to the finding that
21 Compass has no relationship to any of the parties in
22 essence, there were certain disclosures that were made
23 to this Court and filed with regard to connections, and
24 I would ask the finding be that otherwise, other than
as disclosed, there are no such connections.

1 THE COURT: I'm relying on Mr., I mean, I
2 wondered about that. Mr. Allison's affidavit does not
3 contain that exception. His affidavit says they do not
4 have any pre-petition or post-petition affiliation as
5 an absolute member. As an absolute.

6 MS. CARLYON: And they do not. I don't think
7 they have any affiliation whatsoever. I think there
8 were certain connections that were disclosed to this
9 Court that don't rise to that level.

10 THE COURT: He also says they do not exhibit
11 affiliations with any of them. It says affiliations.

12 MS. CARLYON: And I think that's absolutely
13 true.

14 THE COURT: Okay.

15 MS. CARLYON: And then with regard to the
16 analysis under 1129 A-7, you adopted the actual
17 submission by Mr. Allison with regard to the
18 liquidation class. Would it be appropriate for the
19 Court also to find that no countervailing evidence has
20 been presented by any objecting creditor that they
21 would not receive as much through confirmation as in a
22 liquidation?

23 THE COURT: That's fine. I said the only
24 evidence I had was.

25 MS. CARLYON: Right.

1 THE COURT: I guess I assumed from, if you
2 want to add the next statement that there was no
3 countervailing evidence, that's fine, too.

4 MS. CARLYON: Thank you, Your Honor.

5 MR. MEROLA: Your Honor, would it be
6 appropriate to make findings that the direct lenders'
7 interest under the notes and deed of trust have not
8 been amended or modified pursuant to the plan?

9 THE COURT: Yes. Yes, I think that's what
10 the plan says, but that's another day.

11 MR. MEROLA: Thank you, Your Honor.

12 THE COURT: Okay. Thank you. Just when do
13 you anticipate uploading the findings and the orders so
14 my staff knows?

15 MR. MEROLA: Everyone is very anxious to have
16 the order entered, but given the numbers of parties
17 that have to review it, we're going to work throughout
18 the afternoon. We have working drafts proposed. We'll
19 have the augmented, we're going to incorporate, I
20 think, your oral findings rather than trying to
21 recreate them, but the parties have already been
22 working on drafts of both documents.

23 THE COURT: Okay.

24 MS. JARVIS: I think we're substantially
25 there between the committees and the debtors. Now it's

1 a matter of distributing it to all the other parties to
2 common on before submitting it to the court.

3 MS. CARLYON: Does it make sense to shorten
4 the time to sign off on the order or file objections?

5 THE COURT: Well, let's give everybody 24
6 hours to review the findings.

7 MS. CARLYON: Thank you, Your Honor.

8 MR. MEROLA: Thank you, very much for your
9 patience, Your Honor.

10 (Whereupon, the morning's proceedings were
11 concluded at 12:10 p.m.)

12

13 ATTEST: True and accurate transcript.

14 René R. Hannah by M. White

15 RENE R. HANNAH, CCR #326

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